FILE COPY

Office Supreme Court, U.S.
FILED
AUG 26 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 348

NORMAN KLOTZ,

Petitioner,

vs.

SEARS, ROEBUCK & Co.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD H. NORTON
105 W. Adams Street
Chicago 3, Illinois
RA. 6-3803
Attorney for Petitioner

FRANK J. MACKEY, JR.
134 South LaSalle Street
Chicago 3, Illinois
AN. 3-2000
Of Counsel

The Schaffer Press, Inc. — ANdover 3-6850

INDEX

	PAGE
Jurisdiction	1
Questions presented	2
Statutes involved	2, 3
Statement	3
Reasons why the writ should be granted	8
Conclusion	15
Appendix	
Opinion below	1a
Judgment below	6a

CITATIONS.

Cases:

F. W. Woolworth Co. v. Wilson, 74 F. 2d 439 (5th Cir., 1934)	10
Jennings v. Murphy, 194 F. 2d 35, 38 (7th Cir., 1952)	13
Krienke v. Illinois Central Railroad Company, 249 F. 2d 840 (7th Cir., 1957)	9
Maryland Casualty Co. v. Reid, 76 F. 2d 30, 33 (5th Cir., 1935)	10
Wetherbee v. Elgin, J. & E. Ry. Co., 191 F. 2d 302, 309, 310 (7th Cir., 1951)	12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

NORMAN KLOTZ,

Petitioner,

vs.

SEARS, ROEBUCK & Co.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Norman Klotz, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on June 5, 1959.

CITATIONS TO OPINION BELOW.

Klotz v. Sears, Roebuck & Co., 267 F. 2d 53 (7th Cir., 1959).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., sections 1254 (1) and 2101(c).

QUESTIONS PRESENTED.

1. Whether the conflict between the holding in the instant case and the decision in *Maryland Cas. Co.* v. *Reid*, 76 F. 2d 30 (5th Cir., 1935) shall be allowed to continue unresolved.

2. Whether Rule 46 of the Federal Rules of Civil Procedure is not controlling in a diversity case as was held by the Court of Appeals so that defendant's failure to object did not waive the error since a state court decision so holds or whether, as was contended by petitioner, state court decisions are inapplicable.

3. Whether under Rule 59 of the Federal Rules of Civil Procedure a new trial in a diversity case can be allowed upon authority of a lower state court decision as was held by the Court of Appeals, or whether this is a Federal matter to be determined independently of state law as was contended by petitioner.

4. Whether the Rule of the Court of Appeals that where the verdict is large the record will be more closely scrutinized for error is a correct one or whether, as contended by petitioner, this establishes a double standard of justice, calling for an exercise of this Court's power of supervision because it is a far departure from what has been regarded as the usual and accepted course of judicial proceedings.

STATUTES INVOLVED.

Federal Rules of Civil Procedure, 28 U.S.C.

RULE 46. EXCEPTIONS UNNECESSARY.

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action

which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

RULE 59. NEW TRIALS.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

STATEMENT.

This action was brought by Norman Klotz for personal injuries sustained by him on June 5, 1956. Plaintiff claimed that these injuries proximately resulted from the alleged negligence of and alleged breaches of warranty by defendant. The case was filed by the plaintiff in the Circuit Court of Cook County, Illinois and removed by the defendant to the Federal Court by reason of the diversity of citizenship between the parties.

The jury returned a verdict of $100,000.00 in favor of plaintiff, upon which the trial court entered judgment.

In the early part of June, 1955, plaintiff purchased a sprayer from the defendant (App. 48). The sprayer was

one of the type commonly used for spraying trees and shrubbery and was composed essentially of two parts—a tank with hose and nozzle, and a pump assembly. (App. 34).

Affixed to the tank of the sprayer was a label which contained certain statements alleged by plaintiff to be warranties upon which he relied and which were allegedly breached by defendant. These statements were as follows:

> "SUPERIOR CONSTRUCTION — Wide 5 inch open top easy to fill and clean. Single opening sealed with single oversized gasket. Built-in two inch brass pump, with positive sealing foot valve. Electrically welded steel tank, galvanized in molten zinc after welding.
>
> "SAFE OPERATION—Steel safety lock releases pressure before top is opened. Automatic shut-off hand valve with extension and non-clog spray nozzle." (Ex. 1)

Also contained on the label were directions for use of the sprayer, which read in part:

> "After using, always rinse out tank, hose and nozzle with clean water and allow to dry. Unlock pump when storing." (Ex. 1)

Plaintiff testified that during the year 1955 the sprayer was used ten or fifteen times and during 1956 was used five or six times (App. 49). On the occasion of each such use, the sprayer operated normally (App. 66), and plaintiff testified that the tank of the sprayer was washed out after each use (App. 49). However, the lower third of the interior of the sprayer tank, which is in evidence as plaintiff's Exhibit 1, revealed rings which defendant's witness Giles Bullock, the President of the company which manufactured the sprayer, testified resulted from per-

mitting liquids to remain in the tank after use, thereby causing corrosion and deterioration (App. 106-107).

On June 5, 1956, while the plaintiff was spraying a tree at the rear of his home, the sprayer exploded and some part of it struck him in the left eye, inflicting injuries of so serious a character that the eye was eviscerated (App. 51, 91).

At the time of his injury plaintiff was 26 years of age (App. 48) and was just completing his third semester of Architectural Engineering at the University of Illinois (App. 50).

On the trial of the case, the plaintiff offered the testimony of John E. Blair, a Professor of Mechanical Engineering at the Illinois Institute of Technology. Professor Blair examined the various parts of the sprayer tank and testified that the lower portion of the tank was not properly bonded (App. 33).

Professor Blair, who was, as the defendant admitted, an outstanding man (App. 146), testified that the bottom and the sides of the tank were not properly bonded together, as evidenced by rusted portions which indicated that the zinc did not penetrate down into the joint and did not go all the way around and therefore its strength was much less than would be expected from a proper type of zinc dip and plating. Professor Blair further testified that a normal man could produce an internal pressure within the tank of 30 to 35 pounds and that the overall structure of the tank was sufficiently strong provided all parts were bonded together as good production work would indicate (App. 33). Shear marks were found on the tank which indicated that the bottom of the tank was expelled from it with considerable force. Rust marks found on the tank could only exist in the place where

found if the zinc had not in fact been overlaid into the joint area between the bottom and side of the tank (App. 37).

He said 50 to 60 percent of the total bonding area had not been bonded and that in this condition the tank would blow out (App. 38).

He explained that the zinc acts as a shield to the base metal; that the ingredients which are used in the tank will not deteriorate the seams if the zinc completely covers. However, if the zinc does not cover even water will corrode the base metal of the tank which is iron (App. 45). He found that the tank did not explode because of exterior damage to it and that no outside mechanical action was involved.

Mr. Bullock, the president of the company that made the sprayer, was not an engineer but he admitted on cross-examination that the bottom of the tank is supposed to be completely covered with zinc all the way around inside and out (App. 111). He also admitted that the sprayer was a semi-explosive instrument (App. 115).

While this case was pending, the defendant secured an order of Court, requiring the plaintiff to deliver the sprayer up to the defendant, for the purpose of examination, by technical experts; this was accordingly done (App. 131-132). Notwithstanding the fact that this sprayer was in the possession of the defendant for an extended length of time for examination by technical experts, no testimony was offered as to the result of any experiments, demonstrations, metallurgical or engineering tests while in the defendant's possession, nor did any technical expert testify. It therefore may be assumed that Professor Blair's testimony could not be contradicted.

As a result of the explosion, the plaintiff received so severe a blow that he lost consciousness (App. 51). He was removed to Resurrection Hospital where he was examined and treated by Dr. Matusak (App. 90). The doctor testified that the plaintiff had two very deep lacerations, one over the cheek and one over the forehead which extended down to the bone. His upper lid was split open, right up to the brow, and the eye itself had been ruptured from the injury; the contents of the eye being present in the wound (App. 90). He also had several smaller lacerations, with a hemorrhage between the layers of skin, and a great deal of swelling (App. 90).

The doctor removed the remaining part of the eye and its contents under a general anesthetic, inserted a small plastic sphere in the shell of the eye, and closed and sutured the wound (App. 92). Plastic repair was done on the lacerations (App. 91).

A second operation was performed about a month later, to remove the plastic sphere, which the eye socket would not tolerate, and the wound was again sewed up (App. 93).

The plaintiff purchased an artificial eye, which he was wearing at the time of the trial. Since the left eye socket was deepened and sunken as a result of the accident (App. 74, 94), plaintiff's appearance was changed, and he now suffers from an obvious deformity.

More serious is the defect which results from lack of power to move the artificial eye. When plaintiff moves his eyes to the right his artificial eye turns only slightly, so it has the appearance of turning out. When he moves his eyes to the left the same is true, giving him the appearance of being cross-eyed (App. 77).

Also, there is a lid lag in downward gaze. The left upper lid does not follow the movement of the eye down-

ward, so he has the appearance of one eye open and one shut (App. 77, 25).

Functionally, plaintiff is grievously handicapped. He has lost his depth perception (App. 56, 78), which renders him unfit for many occupations. He finds himself unable to draw freehand; this is important in architectural engineering, which he was then studying at the University of Illinois under the GI Bill (App. 56, 57), and following his injury, he gave up his studies (App. 26, 29). He also is handicapped in driving a car (App. 80, 82).

Finally, the plaintiff has lost his spare eye, and in the event of disease or injury to the remaining eye, he will be completely blind. He is more susceptible to injury than a person with normal eye sight (App. 79). At the age of 28, he has a long life before him during which his disabilities must be endured. His expectancy is 41.62 years (App. 87, 88).

REASONS WHY THE WRIT SHOULD BE GRANTED.

This case involves important questions of Federal Civil Procedure. This is a personal injury case which was removed to the Federal Court by reason of diversity of citizenship. It is not the kind of case that this Court has often decided but it is the kind of case which is most often heard in the lower Federal Courts. By reason of the great volume of personal injury litigation it is not surprising that it is in this field that the lower Federal Courts are most frequently called upon to interpret and construe the Federal Rules of Civil Procedure.

Among the most important of these Rules are Rules 46 and 59. The Court of Appeals in the instant case held that a new trial must be allowed since the trial judge manifestly abused his discretion in failing to grant a new

trial under Rule 59. The Court of Appeals found this manifest abuse of discretion by the trial judge to have occurred in his failure to recognize and correct by ordering a new trial allegedly prejudicial errors committed by plaintiff's counsel in his final argument to the jury. In each and every instance, the error complained of was either not objected to, or if proper objections were made, they were sustained by the trial judge. It is petitioner's position that as to matters not objected to, error was waived by reason of the provisions of Rule 46, itself and prior decision of the Court of Appeals for the 7th Circuit construing Rule 46. The 7th Circuit in *Krienke* v. *Illinois Central Railroad Company*, 249 F. 2d 840 (1957) at p. 844 said:

> "No objection to the question was made and for that reason the charge of error cannot be considered by us. Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 46. *Fort Worth and Denver R. Co.* v. *Harris*, 5th Cir., 230 F. 2d 680, 682; *Fort Worth and Denver R. Co.* v. *Janski*, 5th Cir., 223 F. 2d 704, at page 708. To the same effect is 4 C.J.S. Appeal and Error, sec. 244, p. 760."

The above case was cited to the Seventh Circuit by the plaintiff in his brief but the Court did not follow its own decision but instead, the Court in its opinion in *Klotz* v. *Sears Roebuck & Co.*, 267 F. 2d 53 at p. 55, said:

> "The fact that the defendant did not object to some of the remarks . . . does not, in our view, on the record before us, sustain the District Court's denial of a new trial".

This decision of the Seventh Circuit is not only in conflict with that of other Circuits, *e.g.*, *Maryland Casualty Co.* v. *Reid*, 75 F. 2d 30, 34 (5th Cir., 1935) but, of course, with its own prior decision in the *Krienke* case. This im-

portant question of federal law has not been decided by this Court and it should be.

The only Federal case relied upon by the Seventh Circuit was *F. W. Woolworth Co.* v. *Wilson*, 74 F. 2d 439 which was decided in 1934 by the Fifth Circuit.

The Seventh Circuit in its opinion in the instant case *Klotz* v. *Sears Roebuck & Co.*, 267 F. 2d 53, 55 quoting from the *Woolworth* case pp. 442-443, said:

> "The appeal to the jury to put themselves in plaintiff's place was improper. One doing that would be no fairer judge of the case than would the plaintiff herself. * * * Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law".

However, as plaintiff showed the Court in his Brief, this is not the law in the Fifth Circuit for, one year later, in 1935, the Fifth Circuit in *Maryland Cas. Co.* v. *Reid*, 75 F. 2d 30 distinguished *Woolworth* saying at p. 33:

> "'We understand the general rule to be that the remarks of counsel to the jury on the merits, to constitute reversible error, must be objected to at the time, be unwarranted by the pleadings and evidence, have a tendency to mislead or prejudice the jury, and be to more or less extent approved by the trial judge.' We applied this rule in *Woolworth Co.* v. *Wilson*, 74 F. (2d) 439, 443. *We found reversible error in a persistent course of argument because 'it went wholly unrebuked by the judge.'*" (emphasis supplied)
>
> "In saying there, 'sympathy for suffering and indignation at wrong are worthy sentiments, but they

are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law,' we did not mean to say that legitimate advocacy transgresses trial rules; that counsel may not be advocates in a jury trial. Nor did we mean to say that advocacy may not be legitimately used to arouse sympathy for suffering, and indignation for wrong. Sometimes these are of the very essence of the trial. We meant to say, we said, that they could not be illegitimately or falsely used. We merely said that since the verdict must be, as far as the trial judge may bring it about, dispassionately arrived at, his failure to rebuke the reiterated appeals to prejudice and illegitimate sympathy, his failure to advise the jury that a red herring was being deliberately drawn across the trail, was, under the circumstances of that case, error."

The rule as set forth by the Fifth Circuit is that the trial judge must fail to act when objections are properly made. This seems to be the rule uniformly followed in the Federal Courts or, at least, the Seventh Circuit was unable to find any Federal case supporting its holding (certainly the *Wooluorth* case did not) and, therefore, resorted to a lower state court decision saying at p. 55:

> "Prejudicial argument of counsel of the character here indulged in is sufficient cause for reversing a judgment even though the trial court has sustained objections to the statements and directed the jury to disregard them, *Westbrook* v. *Chicago & N. W. Ry. Co.*, 248 Ill. App. 446 (451)."

This brings again to the forefront the question of whether or not in diversity cases the Federal Rules are

to be interpreted in the light of state court decisions or whether, as is contended by the petitioner, these are Federal questions which must be determined independently of state law.

Nothing in the opinion in this case directly points to the real reason for reversal except one sentence. That sentence from p. 55 of the Court's opinion reads:

> "We think the question of liability was close on the facts and the damages assessed are very substantial."

The first half of the sentence is not true. The plaintiff proved a breach of warranty; the defendant offered practically no proof to rebut plaintiff's case. Defendant did argue that plaintiff did not take proper care of the sprayer in that he failed to wash it out after each use but this was an argument relating to contributory negligence which was no defense to plaintiff's claim of breach of warranty and the jury was so instructed. Defendant in its brief raised no question as to the propriety of this instruction.

The real reason for reversal then was not that the case was close, but that the damages were "very substantial". The reputation of the Seventh Circuit as a graveyard for plaintiff's verdicts is well deserved and is rooted in two decisions of the Seventh Circuit not often cited but always followed. The Court in *Wetherbee v. Elgin J. & E. Ry. Co.*, 191 F.2d 302 (1951) said at page 309:

> "But if a federal trial judge approves an excessive verdict, the quite generally accepted rule is that, barring reversible error on other grounds, the appellate court is powerless to provide a remedy. Regardless of how apparent in the record the injustice of the award is, the appellate court must sit supinely by and say 'We are sorry but we can't do anything about it.'"

And at p. 310 the court said:

> "After stating the rule that the trial judge alone has the right and the duty to set aside the verdict for excessiveness of the award, this court said in *Buchanan* v. *Chicago & N. W. Ry. Co., supra*, 159 F. 2d at page 578: '* * * However, the reviewing court can, if it thinks the verdict is not according to the weight of the evidence, scan the trial more closely for error * * *.'
>
> "We do so here, and proceed to examine the alleged errors which defendant contends entitle it to a new trial."

(The case was of course reversed.) Stated in plain English, this means that if the Court does not agree with the amount of the verdict, if it is, in the Court's opinion, too much, the case will be reversed. This is the Rule of the Seventh Circuit. It constitutes a double standard of justice. Interestingly enough, it might be noted here that no claim was made by the defendant that damages in this case were excessive and it is doubly interesting to note that the Court went out of its way to state that damages assessed were "very substantial". No comment from the Court, but the jury evidently felt the injury was very substantial.

If this boy who lost his eye had gotten nothing, the Seventh Circuit would not have closely scanned the record for error; far from it. Take the *Jennings* case.

In *Jennings* v. *Murphy*, 194 F. 2d 35, 38 (7th Cir., 1952) an attorney made remarks so improper as to bring upon himself severe censure from the trial court which, nevertheless, denied a new trial. The Court, affirming the judgment, said, p. 38:

> "We are in hearty sympathy with the expressions of the experienced trial judge concerning the obligations of trial lawyers. We, too, disapprove such appeals to prejudice; such references to irrelevant matters have no power place in a trial under American jurisprudence. However, we must remember that the

> trial court, endowed with the primary responsibility for maintenance of impartial minds upon the part of the jurors, inspired with a conscientious desire to conduct the trial in an atmosphere of fairness and impartiality, decided, after due deliberation and after full opportunity to consider everything that had happened, that there was nothing of such character as to prejudice the jury * * * Furthermore, granting or refusing a motion for a new trial rests within the sound discretion of the trial court and its ruling in this respect can not be disturbed on appeal in the absence of a showing of a manifest abuse of such discretion. There being, we think, absence of clear abuse of discretion, the judgment must be affirmed. *Firestone Tire & Rubber Co.* v. *Nollman*, 5 Cir., 107 F. 2d 176; *Fyre* v. *Lyon*, 55 App. D.C. 48, 299 F. 920."

The difference between the instant case and the *Jennings* case, aside from the fact that no errors comparable to what took place in the *Jennings* case occurred in the *Klotz* case, was very simple; the verdict in *Jennings* was: "Not Guilty".

It is a fact that the double standard of justice prevailing in the Seventh Circuit is such a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Why should the case of a boy without an eye be judged one way if he wins and another if he loses?

If this Court will allow a Writ in this case, this practice can be stopped as it should be—as it must be.

CONCLUSION.

Implicit is the clearly stated doctrine of *Wetherbee* v. *Elgin J. & E. Ry. Co.*, 191 F. 2d 302 (7th Cir., 1951) is the inescapable fact that the Seventh Circuit has arrogated unto itself the function of the jury. By its usurpation of the jury's power it has, and continues to, deprive litigants of their constitutional right to a jury trial, apparently secure in the belief, which must be a mistaken one, that the Supreme Court will not interfere. The issue at stake here is the preservation of our constitutional system of government. May the Court please allow a writ in this case.

Respectfully submitted,

EDWARD H. NORTON
105 West Adams
Chicago 3, Illinois
RA 6-3803
Attorney for Petitioner

FRANK J. MACKEY, JR.
134 South LaSalle Street
Chicago 3, Illinois
AN 3-2000
Of Counsel.

APPENDIX.

In the
UNITED STATES COURT OF APPEALS.
For the Seventh Circuit

SEPTEMBER TERM, 1958 - APRIL SESSION, 1959

No. 12575.
NORMAN KLOTZ,
Plaintiff-Appellee
v.
SEARS, ROEBUCK & Co.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 5, 1959

Before DUFFY, *Chief Judge*, MAJOR and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. This diversity action was brought by plaintiff-appellee, Norman Klotz, hereinafter called plaintiff, against Sears, Roebuck & Co., defendant-appellant, hereinafter referred to as defendant, to recover damages for personal injuries sustained as a result of the explosion of a sprayer purchased from defendant. As a result of the injuries it was necessary to remove plaintiff's left eye. The jury returned a verdict for plaintiff assessing damages at $100,000.00. The District Court entered judgment on the verdict and denied defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

Defendant appealed. It contends the trial Court erred in failing to grant a new trial. The contested issues are:

First, did statements by plaintiff's witnesses and by plaintiff's counsel in his argument to the jury constitute reversible error? Second, did the trial Court err in its instruction to the jury regarding loss of future earnings? Defendant asserts that prejudicial statements and the erroneous instruction deprived it of a fair trial.

Plaintiff contends that no reversible error exists because the statements complained of either were not objected to or objections were sustained and the jury instructed to disregard them, that the instruction challenged was proper and that there is no clear showing of abuse of discretion by the trial Court in denying the motion for a new trial.

In the early part of June, 1955, plaintiff purchased a sprayer from defendant. It was of the type commonly used for spraying trees and shubbery and was composed of two parts—a tank with hose and nozzle, and a pump assembly. During 1955 the sprayer was used ten or fifteen times and during 1956 several times.

On July 5, 1956, while plaintiff was using the sprayer it exploded. The bottom section separated from the cylinder. Plaintiff sustained two cuts on his face and the loss of his left eye. At the time of the incident plaintiff was 26 years of age and was completing the third semester of University studies in Architectural Engineering. After the injury he did not return to his University studies but has been gainfully employed since November, 1956—first in construction work and at the time of the trial as an account clerk with an Insurance Company. Plaintiff testified that in connection with his architectural studies he was required to do freehand sketching, which he can still do, but that the loss of his eye has affected his ability to put depth perception into his sketches. That it had no effect on his ability to do construction scale drawings. The testimony conflicted as to whether the explosion was caused by a defect which occurred during the process of the manufacture of the sprayer or was caused by corrosion resulting from failure to rinse out the sprayer after

use. The directions for the use of the sprayer contained instructions that it should be rinsed out after each use.

During the course of argument to the jury plaintiff's counsel, after having twice entreated the jurors to "do unto others as you would have them do unto you" asked the jury to test the sincerity of the argument to be made on behalf of the defendant by what defendant's counsel would "have taken for his eye". The Court on the defendant's objection instructed the jury to disregard the remark.

Earlier plaintiff's counsel had stated "I don't think, ladies and gentlemen, no matter how much money this man is awarded—and I am telling Mr. Parsons[1] to tell us what he will take for his eye, when he was 28—no matter what you give him it won't be enough".

At another point, over defendant's objection, reference was made to a hypothetical discussion between plaintiff and a friend of the same age, also attending school, in which, on the assumption that an eye could be successfully transferred from one person to another, plaintiff seeks to purchase his friend's eye. Plaintiff's counsel was permitted to pose the rhetorical question "What is the eye worth and what could you get anybody to give it to you for?" Before reference was made to this hypothetical discussion plaintiff's counsel had stated "Back in 1956 Sears, Roebuck and Company bought Mr. Klotz' eye. It is your job today to decide what he is going to sell it for." This followed a reference to the effect that the defendant fixes the prices of things it sells "and you pay it or else". Defendant objected and the Court advised the jury that they could disregard the remark.

Plaintiff's counsel closed his argument with the plea "We ask you to give us the kind of deal that you would want to get".

These remarks made by plaintiff's counsel were in effect pleas that the jury permit sympathy, rather than the facts

[1] Defendant's counsel.

in evidence to determine the issues. This type of appeal to sympathy or charitable considerations falls within the class of argument condemned in *F. W. Woolworth Co.* v. *Wilson*, 74 F. 2d 439, 5th Cir. 1934, where plaintiff's counsel asked the jurors if they would be willing to put themselves in plaintiff's position for a few paltry thousand dollars. The court stated at pages 442-443:

> "The appeal to the jury to put themselves in plaintiff's place was improper. One doing that would be no fairer judge of the case than would the plaintiff herself. * * * Sympathy for suffering and indignation at wrong are worthy sentiments, but they are not safe visitors in the courtroom, for they may blind the eyes of Justice. They may not enter the jury box, nor be heard on the witness stand, nor speak too loudly through the voice of counsel. In judicial inquiry the cold clear truth is to be sought and dispassionately analyzed under the colorless lenses of the law.

See also *Bale* v. *Chicago Junction Ry. Co.*, 259 Ill. 476 (480).

The fact that the defendant did not object to some of the remarks and on objections the Court instructed the jury to disregard others does not, in our view, on the record before us, sustain the District Court's denial of a new trial.

Prejudicial argument of counsel of the character here indulged in is sufficient cause for reversing a judgment even though the trial court has sustained objections to the statements and directed the jury to disregard them, *Westbrook* v. *Chicago & N.W. Ry. Co.*, 248 Ill. App. 446 (451).

We are mindful of those decisions including that of this Court in *Jennings* v. *Murphy*, 194 F. 2d 35, 7th Cir., 1952, that the granting or refusing of a motion for a new trial rests within the sound discretion of the trial court and its ruling is not to be disturbed without a showing of a manifest abuse of discretion.

We think the question of liability was close on the facts and the damages assessed are very substantial.

The nature of the remarks, their number and repetition, when considered in connection with the record as a whole, evidences a deliberate appeal to the jury to substitute sympathy for judgment and impels us to reverse and remand for a new trial. It thus becomes unnecessary to consider the question raised with regard to the instruction.

The judgment of the District Court is reversed and the cause remanded for a new trial.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Friday, June 5, 19 .....

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. J. Earl Major, Circuit Judge
Hon. Latham Castle, Circuit Judge

Norman Klotz *Plaintiff-Appellee*		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12575	vs.	
Sears, Roebuck & Co. *Defendant-Appellant*		

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and that this cause be, and it is hereby REMANDED to the said District Court for a new trial, in accordance with the Opinion of this Court filed this day.

FILE COPY

FILED
OCT 9. 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 348

NORMAN KLOTZ,

Petitioner,

vs.

SEARS, ROEBUCK & CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BURTON Y. WEITZENFELD
120 S. La Salle Street
Chicago 3, Illinois
Attorney for Respondent

EDWARD J. GRIFFIN,
Of Counsel

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Questions Presented	1-2
Statement of the Case	2
Argument	3
I. Whether under Rule 46 of the Federal Rules of Civil Procedure a Defendant Which Has Been Denied Substantial Justice Because of the Deliberate Prejudicial Misconduct of Plaintiff's Counsel Waives its Right to a New Trial when, Although Objecting to Numerous Inflammatory and Improper Statements of Counsel, it Fails to Object to a Few of the Many Prejudicial Remarks.	3
II. Whether it is Error for a Court of Appeals to Cite a Decision of a State Court Rather Than a Federal Court in Support of a Proposition of Law Which Has Long Been Accepted and Applied in the Federal Courts Under the Federal Rules of Civil Procedure?	6
III. Whether, in a Case Which has been Remanded for New Trial, There is any Reason for Reviewing Alleged Error Relied Upon by Petitioner When that Error is Not Fundamental to the Further Conduct of the Case.	7
IV. Whether a Vitriolic and Unwarranted Attack Upon the Dignity and Integrity of a Court of Appeals in an Effort to Protect an Unjustified Verdict Precludes Consideration of a Petition for Writ of Certiorari?	8
Conclusion	9

PAGE

Table of Cases

Adams Dairy Company v. St. Louis Dairy Company, 260 F. 2d 46 (8th Cir., 1958) 4

Aetna Life Ins. Co. v. Kelley, 70 F. 2d 589 (8th Cir., 1934) 4

August v. United States, 257 F. 388 (8th Cir., 1918) 4

Fields v. United States, 205 U.S. 292, 51 L. Ed. 807, 27 S. Ct. 543 (1907) 5

James Stewart & Co. v. Newby, 266 F. 287, 295-6 (4th Cir., 1920), ... 6, 7

Jennings v. Murphy, 194 F. 2d 35 (7th Cir., 1952) 8

Krulewitch v. United States, 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949) 7

Land v. Dollar, 330 U.S. 731, 91 L. Ed. 1209, 67 S. Ct. 1009 (1947) 7

Maryland Cas. Co. v. Reid, 76 F. 2d 30 (5th Cir., 1935) 5

New York Central Railway Company v. Johnson, 279 U.S. 310, 73 L. Ed. 706, 49 S. Ct. 300 (1929) 3

Robinson v. Pennsylvania R. Co., 214 F. 2d 798 (3rd Cir., 1954) 4

Rouse v. Burnham, 51 F. 2d 709 (10th Cir., 1931) 4

United States v. General Motors Corp., 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 348

NORMAN KLOTZ,

Petitioner,

vs.

SEARS, ROEBUCK & CO.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

1. Whether under Rule 46 of the Federal Rules of Civil Procedure a defendant which has been denied substantial justice because of the deliberate prejudicial misconduct of plaintiff's counsel waives its right to a new trial when, although objecting to numerous inflammatory and improper statements of counsel, it fails to object to a few of the many prejudicial remarks?

2. Whether it is error for a Court of Appeals to cite a decision of a state court rather than a Federal Court in support of a proposition of law which has long been accepted and applied in the Federal Courts under the Federal Rules of Civil Procedure?

3. Whether, in a case which has been remanded for new trial, there is any reason for reviewing alleged error relied upon by petitioner when that error is not fundamental to the further conduct of the case?

4. Whether a vitriolic and unwarranted attack upon the dignity and integrity of a Court of Appeals in an effort to protect an unjustified verdict precludes consideration of a petition for writ of certiorari?

STATEMENT OF THE CASE.

This was a personal injury suit in which the question of liability was extremely close. Throughout the trial, and particularly in his closing argument, plaintiff's counsel deliberately and persistently incited and inflamed the passions and prejudices of the jury, which conduct resulted in a verdict for plaintiff. (The opinion of the Court of Appeals in this case refers to some of the improper conduct.) On appeal, plaintiff, though put to the test by defendant's brief, did not deny, but in effect conceded that the inflammatory remarks were deliberate, wilful and prejudicial. He sought to avoid the consequences of his counsel's planned campaign of misconduct by seeking refuge in the contention that the errors were either cured by the sustaining of objections thereto or were waived by a failure to object. The Court of Appeals unanimously rejected this contention and held that the deliberate prejudicial remarks of counsel and their continued use after objections by defendant and the almost constant admonition of the court, required the granting of a new trial.

ARGUMENT.

I. Whether under Rule 46 of the Federal Rules of Civil Procedure a Defendant Which Has Been Denied Substantial Justice Because of the Deliberate Prejudicial Misconduct of Plaintiff's Counsel Waives its Right to a New Trial when, Although Objecting to Numerous Inflammatory and Improper Statements of Counsel, it Fails to Object to a Few of the Many Prejudicial Remarks?

The record in this case is replete with deliberate, inflammatory remarks by plaintiff's counsel which were so prejudicial as to deprive defendant of substantial justice and to impel the Court of Appeals to grant a new trial. During the course of the closing argument by plaintiff's counsel, it was necessary for defendant's counsel to interrupt no less than eleven times to make objections, and on practically all of these occasions, the objections were sustained. Petitioner contends, however, that defendant's counsel did not interrupt often enough, that he failed to object to a few of the many prejudicial remarks, deliberately made, and that under Rule 46 of the Federal Rules of Civil Procedure, the Court of Appeals could not review his counsel's commission of error insofar as objection was not made thereto during the trial. Petitioner completely ignores the fact that reviewing courts have always had the power, both before and since the adoption of Rule 46, to reverse a judgment where misconduct of counsel was flagrant and resulted in substantial injustice and that this power exists whether or not objection is made to each incident of misconduct.

Prior to the promulgation of the Federal Rules, this Court stated in *New York Central Railway Company v. Johnson*, 279 U.S. 310, 318, 73 L. Ed. 706, 711, 49 S. Ct. 300 (1929), "the public interest requires that the court of its

own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." Similarly, the rule was applied in *August* v. *United States*, 257 F. 388 (8th Cir., 1918), where the court stated at page 392:

> "We think, whatever may be our power otherwise, or our inclination to exercise it, the late amendment to Section 269, Judicial Code (now Section 2111, Title 28) . . . . , fully authorizes and commands us to look to the entire record before the court, and render judgment without regard to the technical error of the want of exceptions to the remarks of counsel."

To the same effect are *Rouse* v. *Burnham*, 51 F. 2d 709, 713, (10th Cir., 1931), and *Aetna Life Ins. Co.* v. *Kelley*, 70 F. 2d 589, 594 (8th Cir., 1934).

Subsequent to the adoption of the Federal Rules, the courts have uniformly recognized their right under Rule 46 to correct prejudicial error on review, even though no objection was made during the trial. Thus, the Court of Appeals for the Eighth Circuit in *Adams Dairy Company* v. *St. Louis Dairy Company*, 260 F. 2d 46, 56 (1958), reviewed error to which no objection had been made during the trial under its "duty to determine whether the parties were denied substantial justice." In *Robinson* v. *Pennsylvania R. Co.*, 214 F. 2d 798 (3rd Cir., 1954), the court stated at page 802:

> ". . . we have never understood it to be the law that flagrantly abusive statements, unsupported by the evidence, and introducing matters clearly irrelevant to the jury's deliberation of the issues on the law and evidence, in the absence of an admonition to the jury, are immune from appellate redress simply because there was not an objection to each such statement."

In a desperate but vain attempt to present an issue which would move this Court to grant a writ of certiorari,

petitioner contends that a conflict is presented by the decision of the 5th Circuit in *Maryland Cas. Co.* v. *Reid*, 76 F. 2d 30 (1935). However, it is clear that no such conflict exists. In that case the court specifically recognized that where injustice would result, a failure to object does not waive error, and that the reviewing court may correct such error on appeal. The court stated at page 33:

> "... a trial judge may never abdicate his function, or surrender to counsel the conduct of the trial. It is still his primary duty to oversee and conduct it. Because this is so, he may, and if he fails to, the appellate court may, though no objection is made and no exception taken, correct an error of abdication which has resulted unjustly, by voiding the trial."

Thus, the action of the Court of Appeals for the 7th Circuit in the instant case is clearly supported by the decisions of this Court and the decisions of the other circuits, including the Fifth. It is in harmony with Rule 46 of the Federal Rules and there is no conflict between the circuits. Petitioner's contention to the contrary is completely without support, and is obviously made in an attempt to cloud the only issue which existed in this case, that is, whether the conduct of plaintiff's counsel was so prejudicial as to deprive defendant of a fair trial. Petitioner has not asked this Court to review that question, and apparently concedes the correctness of the Seventh Circuit's judgment on that point. In any event, it is an issue which must be determined in accordance with the facts of the particular case; and this Court will not grant a writ of certiorari merely to substitute its judgment for that of the Court of Appeals on an issue which is not one of gravity and general importance. *Fields* v. *United States*, 205 U.S. 292, 296, 51 L. Ed. 807, 810-11, 27 S. Ct. 543 (1907). Accordingly, the instant petition does not fall within any of the considerations which govern review on certiorari and should be denied.

2. Whether it is Error for a Court of Appeals to Cite a Decision of a State Court Rather Than a Federal Court in Support of a Proposition of Law Which Has Long Been Accepted and Applied in the Federal Courts Under the Federal Rules of Civil Procedure?

The decision of the Court of Appeals stemmed not only from error to which objection was not made, but also from error resulting from a deliberately planned and executed program of plaintiff's counsel to inflame the jury by repeated prejudicial remarks to which objections were seasonably made and sustained. As to these errors, petitioner contends that a Federal Court of Appeals is powerless to act because the objections to his counsel's conduct were sustained.

Recognizing that his contention is not supported by the law in the state courts, petitioner seeks to advance the proposition that the Federal law is different, and grasping for a straw to support this obviously untenable position points out that in this case the Court of Appeals (which presumably found the language in the case particularly applicable to the instant situation) cited a state court rather than a Federal Court decision. Evidently petitioner seeks to have this Court accept the proposition that because this case was tried in the Federal Courts, his counsel could deliberately and continuously inject prejudicial and irrelevant matter into the trial, and so long as objections were sustained, the Court of Appeals was powerless to correct the error. Acceptance of this argument would grant a license to every lawyer to pursue with impunity a course of conduct deliberately designed to deprive his opponent of a fair trial. This Court and the various Courts of Appeal have never accepted such an argument. *James Stewart & Co.* v. *Newby*, 266 F. 287, 295-6 (4th Cir., 1920), and the cases there cited.

As stated by Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, 453, 93 L. Ed. 790, 799, 69 S. Ct. 716 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, ... all practicing lawyers know to be unmitigated fiction."

Thus, the applicable law in the Federal Courts is the same as that for which the decision of the state court was cited in the instant case, and under such circumstances, the Federal Courts have never hesitated to cite state law in support of their conclusions. *James Stewart & Co.* v. *Newby*, 266 F. 287, 296 (4th Cir., 1920). Accordingly, there was no error in referring to state law in the instant case.

3. Whether, in a Case Which has been Remanded for New Trial, There is any Reason for Reviewing Alleged Error Relied Upon by Petitioner When that Error is Not Fundamental to the Further Conduct of the Case.

Petitioner admits that the conduct of his counsel in the trial court was improper. It may be assumed that counsel will not repeat it at a new trial. Petitioner's only complaint here is that the Court of Appeals was powerless to correct the error by ordering a new trial. Accordingly, the question he raises is not "fundamental to the further conduct of the case", and the order of the Court of Appeals remanding the cause for a new trial is not a final disposition of this cause. Under these circumstances there is no good reason to grant certiorari and for this reason alone certiorari should be denied. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377, 89 L. Ed. 311, 318, 65 S. Ct. 357 (1945); *Land* v. *Dollar*, 330 U.S. 731, 734, 91 L. Ed. 1209, 1214, 67 S. Ct. 1009 (1947).

4. Whether a Vitriolic and Unwarranted Attack Upon the Dignity and Integrity of a Court of Appeals in an Effort to Protect an Unjustified Verdict Precludes Consideration of a Petition for Writ of Certiorari?

The Court of Appeals found that the question of liability in this case was close on the facts, and petitioner concludes, doubtless correctly, that the court scanned the record closely in order to make this determination. Without any basis for so contending, he argues that the court would not have done so had the verdict and judgment been favorable to defendant, and then accuses the Court of employing a double standard of justice. In advancing this contention, petitioner cites *Jennings* v. *Murphy*, 194 F. 2d 35 (7th Cir., 1952), in which the defendant obtained a not guilty verdict. On appeal the court refused to reverse, holding that on the record in that case the alleged prejudicial argument by defendant's counsel was not of such character as to prejudice the jury.

It is a well-established rule that in determining whether particular conduct constitutes prejudicial error, each case must be judged on its own facts. Because a court has concluded in one case that the conduct of counsel was not prejudicial, is not authority for concluding that in no case will the court reach a contrary conclusion. Certainly it does not justify accusing the Court of employing a double standard of justice.

Petitioner here has made an unwarranted assumption that if the positions of the parties were reversed, the Seventh Circuit would not have afforded petitioner the same protection it afforded respondent. That the contention is without merit requires no argument. However, it does not lack significance for it brings forth the lack of substance in the petition for certiorari and characterizes the conduct of petitioner's entire case.

Petitioner's counsel, sorely stung by a most appropriate rebuke by the Seventh Circuit, has used his petition for certiorari as a means of assuaging his vanity by an attack upon the court's character, its philosophy and indeed upon its honesty. This vilification of a United States Court of Appeals by a defeated lawyer manifests the same disregard of decent advocacy and the rules of proper conduct that counsel exhibited in the trial court and which brought about the setting aside of the verdict. Such a broadside attack upon the honor and integrity of the Seventh Circuit should not be countenanced. If the Court is to maintain its dignity, its independence and its freedom of thought, such conduct alone warrants not only the denial of the petition for certiorari, but also censure and further rebuke of counsel.

CONCLUSION.

It is clear that the granting of a writ of certiorari in this case would serve no purpose. There is no conflict to resolve and no departure from accepted judicial procedure to correct. The Court of Appeals decided that the misconduct of plaintiff's counsel at the trial of this case was so blatantly prejudicial as to require a new trial—nothing more. The court clearly has the power to correct such prejudicial error, and the record overwhelmingly justifies the action taken. A review of this case by the Supreme Court would not change the result which must be reached under the record. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted.

BURTON Y. WEITZENFELD,
120 South LaSalle Street,
Chicago 3, Illinois,
Attorney for Respondent.

EDWARD J. GRIFFIN,
Of Counsel.